Before the
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of:	)	
	)	
Amendment of Part 1 of the	)	WT Docket No. 97-82
Commission's Rules --	)	
Competitive Bidding Proceedings	)	

To: The Commission

COMMENTS OF METROCALL, INC.

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SUMMARY

Metrocall, a long-time paging licensee that will soon be subject to auctions, urges the FCC to adopt auction rules that will not unduly burden the legitimate business transactions of incumbent licensees in mature services.

The FCC should adopt a "safe harbor" to its anti-collusion rule to allow incumbents to continue to negotiate mergers, acquisitions, intercarrier agreements, and other common commercial arrangements, along with related non-competition and other covenants, during the period in which the anti-collusion rule applies. Where one or both parties are existing licensees, such negotiations are necessary to the parties' on-going business interests. Those transactions are not undertaken to effect the auction process.

The FCC should define "minor" amendments in auction proceedings to include *pro forma* and involuntary changes of ownership and control, and substantial changes in ownership or control that have been previously approved by the FCC. Involuntary and *pro forma* ownership changes have long been exempt from public notice and cut-off procedures; there is no persuasive reason to treat these changes differently in an auction environment. Amendments that reflect previously-granted assignments or transfers are not subject to abuse, since such amendments may only be filed after the FCC has found the underlying transaction to be in the public interest.

The unjust enrichment rules should provide a generous scale of decreasing liability where the auction winner conveying its license was a pre-auction incumbent. In those circumstances, penalties are unnecessary to prevent speculation and unjust enrichment; the FCC should not penalize licensees who made substantial investments in providing service to the public long before they were subject to auctions.

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COMMENTS OF METROCALL, INC.

Metrocall, Inc. ("Metrocall"), by its attorneys and pursuant to Section 1.415 of the Commission's Rules, 47 C.F.R. § 1.415, hereby submits its Comments in response to the Commission's Notice of Proposed Rule Making[1] ("NPRM") in the above-captioned proceeding.

I. Statement of Interest

Metrocall is one of the largest publicly traded paging companies in the nation (NASDAQ trading symbol: "MCLL"). Through its licensee-subsidiary, Metrocall USA, Inc., Metrocall provides radio common carrier ("RCC") paging and private carrier paging ("PCP") services throughout many areas of the United States. Through its corporate predecessors, Metrocall has provided paging services for more than a decade, and it continues to undergo tremendous growth. Metrocall's RCC facilities serve the Northeast, Mid-Atlantic, Southeast, Southwest and West Coast, and it is in the process of expanding that network throughout other regions of the country through "new" applications and through acquisitions. On two 929 MHz PCP frequencies, Metrocall has nationwide exclusivity; Metrocall also has regional exclusivity on a third 929 MHz frequency and a fourth regional exclusive system through its merger with A+

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[1] Order, Memorandum Opinion & Order, and Notice of Proposed Rule Making, FCC 97-60 (released February 28, 1997).

Network, Inc. ("A+"). Over its RCC and PCP facilities, Metrocall currently has more than two million subscribers, and is actively pursuing business plans to increase its customer base nationwide.

On February 19, 1997, the Commission adopted a Second Report & Order and Further Notice of Proposed Rule Making in WT Docket No. 96-18 and PP Docket No. 93-253, which, *inter alia*, adopted auction rules for paging services. In that proceeding, Metrocall and other commenters urged that the Commission amend its anti-collusion rules to accommodate the legitimate ongoing business discussions of incumbent licensees in mature services. The Commission declined to amend its anti-collusion rules in its rule making proceeding for paging services; however, it has sought comment in this proceeding on this issue. See NPRM at ¶ 102. Additionally, the NPRM indicates that the Commission intends to apply the general auction rules adopted in this proceeding to services, such as paging, that were the subject of pending proceedings to adopt service-specific auction rules.

As a long-time Commission licensee which will soon be subject to competitive bidding procedures, Metrocall has standing as a party in interest to file comments in this proceeding. More specifically, as a licensee for whom acquisitions, intercarrier arrangements and other transactions are a necessary part of doing business, Metrocall's ongoing business plans would be jeopardized by certain proposed rule sections that could restrict transactions among licensees in the ordinary course of business. Metrocall is therefore a party in interest with standing to comment on those proposed rule provisions.

II. Summary of the NPRM.

In the NPRM, the Commission requested comment on a wide variety of proposed

changes to the general auction procedures contained in Part 1 of the Rules, in order to establish a uniform set of provisions applicable to all auctionable services. The NPRM proposed changes to a number of provisions affecting "designated entities," including the adoption of a definition of "gross revenues;" a uniform set of attribution rules; changes in the definition of an "affiliate;" changes to its installment payment plans; and adoption of a uniform unjust enrichment rule based on the broadband PCS rule. The Commission also proposed to require all "short-form" and "long-form" applications to be filed electronically, and proposed uniform definitions of "major" and "minor" changes to those applications for all auctionable services. The NPRM further sought comment on various payment issues, including: whether to modify the practice of returning the upfront payments of bidders withdrawing from an auction during the course of the auction; requiring that all bidders make their second down payments on a date certain, regardless of whether petitions to deny have been filed; adopting uniform default penalties and bid withdrawal payments. Various issues of auction design, including "real time" bidding and the establishment of minimum opening bids, were also put forth for comment, as was the issue of pre-license grant construction by winning bidders.

Metrocall generally supports the Commission's efforts to adopt uniform auction procedures, in order to provide applicants in auctionable services with some level of certainty as to the rules that will apply to them. Metrocall is concerned, however, that the Commission's auction rules, and in particular its anti-collusion rule, do not distinguish between auctions for new services and those for existing, established industries. Metrocall is limiting its comments in this proceeding to those proposed rules which it believes may hamper licensees in conducting their on-going businesses.

III. The Commission Should not Restrict Legitimate Transactions During or After Auctions.

Based upon comments received in its proceeding to adopt service-specific auction rules for paging, the Commission requested comment on establishing a "safe harbor" to permit on-going discussions among incumbent licensee auction participants concerning mergers, acquisitions or intercarrier agreements to proceed during the time when the anti-collusion rules are applicable. See NPRM at ¶ 102.

Metrocall strongly supports the adoption of such a "safe harbor." The vital purpose served by the anti-collusion rule -- "to protect the integrity and robustness of [the] competitive bidding process"[2] -- is not threatened or even implicated by transactions undertaken by companies in the ordinary course of business. Such transactions are not entered into to influence the auction process; they would be undertaken in the absence of any competitive bidding procedure.

In an existing, mature service such as paging, mergers, acquisitions, license "swaps," etc., among incumbents are legitimate business ventures, designed to improve or expand the services that a company is already providing to the public. Similarly, related non-competition agreements, as well as covenants not to materially change the assets being conveyed or to incur extraordinary financial obligations, are a normal part of commercial transactions. When an ongoing business is being acquired, for tens of millions of dollars, it is hardly unreasonable for a buyer to insist that the seller not compete with it (at an auction or otherwise) for a period of time, or for a buyer to seek a covenant that the seller not incur large debts to any party, including the

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[2] See Memorandum Opinion & Order in PP Docket No. 93-253, 9 FCC Rcd. 7684 (1994).

federal government. Yet, these common commercial arrangements would run afoul of the anti-collusion rule if the parties negotiated them between the short-form filing deadline and the date of the auction winners' down payments. The strict application of the anti-collusion rule to existing industries would delay transactions for many months; such lengthy delays may often have the effect of preventing certain transactions entirely.

Intercarrier agreements, reseller agreements and sharing arrangements between licensees could also raise anti-collusion rule issues. For example, 929 MHz paging frequencies were not always allocated on an exclusive basis; it was only through rule changes in 1993 that licensees on certain of the 929 MHz frequencies were permitted to earn exclusivity. In some areas, "exclusive" licensees must co-exist with "grandfathered" licensees who have not qualified for exclusivity; in others, two or more "grandfathered" systems that qualified for exclusivity are in fairly close proximity to one another. Consistent with the Commission's rules, licensees have usually cooperated with one another to allow all the affected licensees to provide service without harmful interference. To the extent that the anti-collusion rule would prohibit licensees from negotiating or amending sharing arrangements, and prevent licensees from making efficient and interference-free use of the spectrum already licensed to them, the application of the anti-collusion rule would disserve the public interest.

Metrocall therefore suggests that the Commission amend Section 1.2105(c) of the rules to specify that the anti-collusion provisions will not apply to preclude a bidder from negotiating for the sale or purchase of existing licenses in the service being auctioned; or for a merger with another party; or for an intercarrier, reseller or sharing agreement; or for covenants not to compete, not to incur extraordinary expenses, or to maintain the *status quo* of licensed assets,

where such covenants are incidental to any of the foregoing types of agreements; provided that either the bidder or the party with whom it is negotiating is an incumbent licensee in the radio service for which the auction is being held. An "incumbent" should be defined as a licensee that holds a license in the radio service at issue, and has timely completed construction of at least one licensed facility and commenced service to subscribers.

Prospective bidders should be required to certify that they will not engage in any negotiations other than those permitted under the "safe harbor" provision, and that during the course of any "safe harbor" negotiations, they will not divulge the substance of their bid amounts or bidding strategies. The Commission should not require disclosure by the parties to those negotiations, or even an affirmative statement that the applicant is engaged in negotiations. In the early stages of negotiations for mergers and acquisitions, confidentiality is often critical, particularly where publicly-traded companies are concerned.

In short, by permitting flexibility to incumbent licensees to negotiate transactions involving their existing services, the Commission will be able to avoid chilling legitimate, market-driven transactions that will benefit both licensees and their subscribers.

IV. Ownership Amendments for Mergers and Acquisitions Should be Deemed Minor.

The NPRM requests comments on the definitions of "minor" and "major" amendments in the auction context. See NPRM at ¶ 48. The FCC proposes "at a minimum" to define changes in ownership or control as "major." Id. Metrocall respectfully submits that this proposal is overly broad and, particularly as applied to existing services, will unnecessarily impair legitimate business transactions. The FCC should permit ownership changes to auction short forms and long forms to accommodate "substantial" changes of control of those applications that are

incidental to mergers and acquisitions, as well as "non-substantial," *pro forma* changes and involuntary changes of ownership or control.

Pro forma and involuntary assignments and transfers have usually been exempted from the FCC's "cut-off" rules. See, e.g., 47 C.F.R. §§ 22.123(a), 90.164(b), 101.37(b)(4)-(5). There does not seem to be any reason for treating these ownership changes differently in the auction context. *Pro forma* ownership changes, by definition, do not involve any substantial change to the parties owning or controlling the applicant. Consequently, these amendments would not involve such a changed proposal as to require significant staff resources or additional public notice.[3] Involuntary ownership changes, occasioned by the applicant's death, disability or bankruptcy, are due to causes beyond the applicant's control. There is no more reason in auction proceedings than in any other to penalize the applicant for such involuntary occurrences. As the Commission has noted elsewhere, "one does not die in order to seek some improper benefit from the assignment or transfer of a broadcast application." See Mid-Florida Television Corp., 46 RR 2d 1503, 1508 (1980). It is equally unlikely that anyone will do so (or suffer disability or bankruptcy) to manipulate an auction.

Additionally, the FCC's rules have often accommodated change-of-control amendments to pending applications that would normally be deemed "major," where the FCC has previously

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[3] Section 309(c) of the Act exempts non-substantial and involuntary changes in ownership and control from the public notice and petition to deny provisions of Section 309(b). See 47 U.S.C. § 309(c)(2)(B). Moreover, the FCC has been asked, pursuant to a forbearance petition, to eliminate all filing requirements associated with *pro forma* changes of ownership and control. See "Petition for Forbearance From Enforcement of Section 310(d) Regarding Non-Substantial Assignments of License and Transfers of Control Involving Telecommunications Carriers Licensed by the Wireless Telecommunications Bureau", by the Federal Communications Bar Association, *et al.* (filed February 4, 1997).

approved an assignment or transfer from the applicant to a third party. For example, Part 22 of the rules already provides for an exemption to the "cut-off" rules for amendments to applications to reflect changes of ownership found by the Commission to be in the public interest. See 47 C.F.R. § 22.123. Similarly, Section 90.164(b) classifies amendments to pending applications to reflect FCC-approved changes in ownership "minor." See 47 C.F.R. § 90.164(b). Metrocall respectfully requests that a similar exemption be incorporated into Section 1.2105(b), or into a new Part 1 rule section categorizing amendments as major or minor, or into service-specific rules for mature services such as paging, so that parties to legitimate acquisitions can modify their short forms as necessary to reflect those acquisitions. These amendments, because they will result only from transactions that have already been passed upon and approved by the Commission, are unlikely to be used abusively or in an anti-competitive manner.

The Commission can ensure that such amendments do not result in any unfairness to other bidders by prohibiting "comparative upgrading" after the short-form filing deadline. That is, an applicant would not be permitted to claim "small business," "very small business," or "entrepreneur" status (and obtain the benefits of that status) as a result of an ownership change made after the short-form filing deadline. Conversely, however, the rules could provide that an applicant may lose the benefits of "designated entity" status by amendments to reflect ownership changes, regardless of when the amendment is filed. In that way, applicants who acquire resources in excess of the applicable financial benchmarks will not be able to take advantage of benefits meant for smaller entities to the detriment of other bidders.

V. Unjust Enrichment Penalties Should Decrease Over the Course of the License Term.

The Commission proposed to conform its general, Part 1 "unjust enrichment" rules to the

broadband PCS "unjust enrichment" rules, pursuant to which a designated entity conveying its license to an entity that does not qualify for that status, or that qualifies for a less favorable payment plan or bidding credit, must repay the value of the benefits it has received, plus interest, as a condition of FCC approval of the assignment or transfer. See NPRM at ¶¶ 41-43. The NPRM also requested comment as to whether a scale of decreasing liability for unjust enrichment payments of bidding credit amounts, based upon number of years the assignor or transferor has held its license, would be appropriate. Id. at ¶ 43.

Metrocall generally supports the Commission's decision to adopt uniform unjust enrichment rules for all auctionable services where benefits such as bidding credits and installment payments are made available to designated entities. Metrocall suggests, however, that where the transferor or assignor is a pre-auction incumbent licensee in the radio service at issue, if the Commission imposes unjust enrichment penalties at all, a scale of decreasing liability for bidding credits is appropriate. Metrocall therefore suggests that the Commission adopt "sliding scale" payment rules similar to those used for Narrowband PCS and recently adopted for 220 MHz services, which are more generous to licensees than the example given in the NPRM. See 47 C.F.R. § 24.309(f)(3) and, Third Report & Order; Fifth Notice of Proposed Rule Making in PR Docket No. 89-552, GN Docket No. 93-252 and PP Docket No. 93-253, FCC 97-57, ¶ 315 (released March 12, 1997), respectively. That is, a licensee that received a bidding credit conveying its license to a party that does not qualify for a bidding credit, or qualifies for a lesser bidding credit, would be required to pay 100% of the bidding credit amount (or difference in bidding credits) in the first two years of the license term; 75% in year three; 50% in year four; and 25% in year five, after which no repayment would be required.

Metrocall believes that a generous "sliding scale" is appropriate where the facilities acquired by auction represent only a portion of the licensed facilities being sold, or where they represent a "geographic overlay" license obtained by an incumbent licensee, to avoid burdening legitimate transactions. In such circumstances, penalty payments are unnecessary to discourage speculation and prevent unjust enrichment; any penalty payments would result in additional transaction costs to the parties without countervailing public interest benefits. Licensees who have been providing service to the public for years (in some cases more than a decade) before the Commission considered subjecting them to auctions, will not be entering those auctions as a "gold rush" to obtain spectrum for profitable resale. Any "enrichment" received by long-time licensees from the sale of their businesses will not be "unjust;" it will be a reflection of the investment those licensees have made in providing valuable services to the public.

Conversely, the Commission's proposed sliding scale, see NPRM at ¶ 43, which involves higher proportional payments for a longer period of time, may be appropriate where the proposed assignor/transferor has no prior "track record" as a Commission licensee. Even in that instance, however, Metrocall submits that penalty payments are inappropriate after the initial license term; once a licensee has provided service for its initial term, at a level sufficient to warrant license renewal, it has already made a substantial investment and demonstrated its *bona fides*. Moreover, since licensees receiving benefits as designated entities must pay their winning bids during the course of their initial license terms, any party seeking to assign or transfer its license after the 10-year term will have already paid its debt to the government. Having done all that was required of them, such licensees should not be subject to any form of "penalty" payment.

CONCLUSION

For the foregoing reasons, Metrocall respectfully requests that the Commission take care to ensure that the proposed changes to its auction rules do not impose unnecessary costs or otherwise inhibit legitimate business transactions among licensees, and that the Commission modify its auction rules as suggested in Metrocall's comments.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Regina Wingfield, a legal secretary in the law firm of Joyce & Jacobs, Attys. at Law, LLP, do hereby certify that on this 27th day of March, 1997, copies of the foregoing Comments of Metrocall, Inc. were mailed, postage prepaid, to the following:

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